

Rameshwar Vs. DIn Dayal

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Court : Allahabad

Decided On : Apr-08-1949

Reported in : AIR1952All424

Judge : Desai, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13

Appeal No. : Second Appeal No. 268 of 1944

Appellant : Rameshwar

Respondent : DIn Dayal

Advocate for Def. : S.N. Srivastava, Adv.

Advocate for Pet/Ap. : J.S. Trivedi, Adv.

Disposition : Appeal dismissed

Judgement :

Desai, J.

1. Rameshwar appellant filed one suit against Din Dayal respondent on the basis of a promissory note in August 1942. In the same month, he filed another suit on the basis of another promissory note against Din Dayal respondent in the connected second civil appeal No. 269. Rameshwar is a resident of village Nawwa

Behar whereas Bhagirath and Din Dayal are residents of village Shankerpur. A process server accompanied by Rameshwar took the summonses to Shankerpur for service on Din Dayal and Bhagirath on 18.8.1942. The process server wrote identical reports on the summonses to the effect that they were offered to the defendants (Din Dayal and Bhagirath), that they refused to accept them in spite of his entreaties and that perforce he had to affix them on their doors. The reports purport to have been signed by the appellant and two witnesses. Neither of the respondents appeared when the suits were called out for hearing on 16-9-1942 and the Court proceeded ex parte against them and decreed the appellant's claims in full. The respondents did not apply for the setting aside of the ex parte decrees but instead filed two separate suits against the appellant for the cancellation of the decrees. They alleged that the promissory notes on which he filed the suits were forged, that he fraudulently prevented them from getting information about the suits by procuring false reports of service of summonses and that consequently the decrees were liable to be set aside on the ground of fraud. They denied that the summonses were offered to them and were refused by them. The relief sought was that the decrees be set aside and that it be declared that they are null and void as against them. The suits were contested, as was expected. The appellant denied that he was guilty of any fraud in the service of the summonses and asserted that the reports of the service were correct and genuine and that the promissory notes were also genuine. He also took the plea that the suits were not maintainable. The trial Court held that the decrees could not be set aside on the ground that the promissory notes were forged, that the reports of the service of the summonses were correct and that the appellant was not guilty of fraud and dismissed the suits. The respondent went up in appeal to the District Judge allowed their appeals. The learned Judge held that the appellant had perpetrated fraud by obtaining fictitious reports of service on the summonses, that they were really not offered to the respondents, that the respondents had no knowledge of the suits and that the decrees passed against them were vitiated by fraud. He, therefore, declared the decrees to be null and void.

2. It was not seriously disputed before me that the decrees could be set aside on the ground that they were obtained by fraud, the fraud being that the respondents were kept back from the knowledge that the suits had been filed against them and

would be disposed of finally on 16-9-1942. If there is any doubt I would refer to Jagrup v. Ram Sabad, 1941 Oudh W. N. 1202, in which an ex parte decree was set aside on a similar ground.

3. In this second appeal it is not open to the appellant to challenge findings of fact. It has been found by the learned District Judge that he secured false reports of service of the summonses without their having been offered to the respondents. It is admitted that he was present when the process-server is said to have offered the summonses and the respondents are said to have refused to accept them. When it is found, as matters of fact, that neither were the summonses offered to the respondents nor were they refused by them and that the appellant was present, it cannot be doubted that he was in league with the process-server and that he prevailed upon him to write false reports on them that they had been offered to, and refused by, the respondents. Thereby he prevented the respondents from appearing in Court on 16-9-1942 which was the date entered in the summonses to contest them. This was clearly a fraud and no attempt was made to argue that it was not.

4. The learned District Judge had simply to see whether the appellant had practised fraud in the matter of service of the summonses or not. He was not trying the original suits act was not concerned with their merits. He himself recognised this and said so in his judgment. Still he took into consideration the fact that the promissory note said to have been executed by Bhagirath did not bear his thumb mark and was a forgery. The trial Court had examined an expert to prove that it was a forgery. It purports to bear Bhagirath's thumb mark but the expert deposed that the thumb mark on it does not tally with Bhagirath's thumb mark. I do not see anything illegal in the act of the learned Judge's paying consideration to the fact that the promissory note was forged. He had to consider whether the absence of the respondents on the date fixed for the hearing in the original suits was deliberate or was on account of their not receiving any information that the suits were to come up for hearing on 16.9.1942. He had to consider whether they had any reason to abstain from attendance in the Court if they had received this information. When he found that the promissory note of Bhagirath was forged and, of course, Bhagirath must have known that it was forged, it was clear that

Bhagirath had absolutely no reason to abstain from attendance in the Court on 36 9-1942 and that if he had any information that the suit against him was fixed for bearing on that date he must have attended it. If he did not attend it, it must have been because he had no information. What a party thinks about the merits of his case is a relevant fact to be considered when one has to see why he was absent when the suit was called out for hearing.

5. It seems to me that the real object behind these appeals was to have the suits retried. It was contended on behalf of the appellant that when the ex parte decrees were set aside by the learned District Judge he should have ordered the suits to be retried. I have mentioned what relief was claimed by the respondents. They had claimed the relief of declaration that the decrees were null and void and not binding on them. They had not claimed that the suits be retried. When they had alleged that the promissory notes on the basis of which they had been filed were forged, naturally they would not have asked for retrial of the suits. The appellant in his written statement also made no counter claim that incase the decrees were set aside as fraudulently obtained the suits should be retried. It did not appear that he made any such request orally in either Court below, Therefore, when there was no request by either party that the suits be retried, the learned District Judge was not wrong in contenting himself with only granting the declaration. If the effect of his declaring the decrees to be null and void is that only the decrees are set aside and that the suits should be deemed to be pending, it is open to the appellant to approach the trial Court and ask it to resume proceedings in the suits. It will then be for the trial Court to determine the effect of the declaration granted by the learned District Judge. It was not necessary, in that case, for the learned District Judge to mention the effect of the declarations in his judgments. It is for a party to know the law. It is not for a Court to give any advice to a party on any matter, even of law. If the effect of the bare declarations is not to revive the suits and if they could be revived only if the learned District Judge while granting the declarations had ordered them to be retried, then it was necessary for the appellant to have made a counter-claim for this purpose. There is no law that he was bound suo motu to order retrial of the suits. If it was necessary for the learned District Judge to order the retrial expressly the effect of his refraining from ordering retrial is that the suits have been dismissed without being heard on merits. The fraud was

committed after the suits had been instituted and had it not been committed, they would have been heard on merits. So it can be argued with some show of force that when the effect of the fraud is nullified by granting the declarations, the suite should be reheard on merits. The appellant had two alternatives when he instituted the suits. One was to have them heard on merits and the other was to have them heard regardless of merits by preventing the hearing on merits through fraud. One is entitled to ask him why, when he chose to have them heard regardless of merits and failed, he should be allowed to fall back upon the other alternative to have them heard on merits and why when he chose to have them heard regardless of merits it should not be inferred that he himself realised that on merits he would fail. It stands to reason that if he thought that he had a strong case on merits he would not have resorted to fraud to prevent the respondents from appearing in Court to contest them. In the case of Jagrap (1841 Oudh W N. 1202), the facts in which were similar to those in the present suits, the decree was simply set aside and the suit was not ordered to be retried. Bennett J., of the Chief Court of Oudh delivering the judgment, observed on page 1204 :

'There is no reason, therefore, why anything should be added by this Court to the decree passed, and certainly there should be no declaration that the appellant is entitled to continue the proceedings in the Court of the Munsif Bangaon from the stage which they had reached prior to the passing of the decree.'

6. I respectfully agree with this observation, Where retrial has been ordered it is in those cases in which the relief sought by the plaintiff himself was of retrial after setting aside the decree fraudulently obtained against him. Where a person challenges the decree only on the ground of fraud and does not allege that the suit itself was false, there may be some justification for ordering retrial when the decree passed in it is set aside on the ground of fraud. But here it was alleged by the respondents that the suits were false. The respondents had an alternative of having the ex parte decrees set aside under Order 9, Rule 13, Civil P. C. on the ground that they were prevented by sufficient cause from appearing in Court. But they had also the alternative of having them set aside through a separate action on the ground of fraud. They were not bound to have recourse to the remedy allowed under Order 9, Rule 13. In *Hip Foong Hong v. H. Nevatia & Co.* (1918) A.

C. 888, there was an application by the defendant for a new trial of the suit on the ground of fraud and so the suit was ordered to be retried. In *Williams v. Preston* (1882) 20 Ch. D. 672, there was an appeal from a decree together with an application for retrial on the ground that the decree had been obtained by fraud and it was held that if fraud was established the application for retrial would be granted. In *Cole v. Langford*, (1898) 2 Q. B. 36, on a separate suit a decree was set aside on the ground that it was obtained by fraud and no direction was given for retrial of the suit. The learned District Judge was, therefore, quite right in simply setting aside the decrees and not saying anything about the retrial of the suits.

7. The appeal fails and is hereby dismissed with costs. This judgment will govern second civil appeal No. 269 of 1944 also.

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